BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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O1 Communications, Inc. (U 6065 C), Complainant, v. New Cingular Wireless PCS, LLC (U 3060 C) and AT&T Mobility Wireless Operations Holdings, Inc. (U 3021 C) Defendant.	Case 15-12-020 (Filed December 28, 2015)

REPLY COMMENTS OF NEW CINGULAR WIRELESS PCS, LLC (U-3060-C) AND AT&T WIRELESS OPERATIONS HOLDINGS, INC. (U-3021-C) TO COMPLAINANT'S COMMENTS ON PROPOSED DECISION OF ALJ KELLY GRANTING MOTION TO DISMISS

DAVID J. MILLER
MARGARET THOMSON
AT&T Services Legal Department
430 Bush Street, Third Floor
San Francisco, CA 94108
Tel: (415) 268-8977
Fax: (415) 974-1990
E-mail: mt4348@att.com

Counsel for AT&T Mobility

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Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), New Cingular Wireless PCS, LLC (U-3060-C) and AT&T Wireless Operations Holdings, Inc. (U-3021-C) (collectively "AT&T Mobility") hereby reply to Complainant's comments ("Comments") concerning the Proposed Decision of ALJ Kelly ("PD") granting AT&T Mobility's motion to dismiss. For the reasons explained below, AT&T Mobility respectfully requests that the Commission reject the arguments made in O1's Comments and adopt the PD.

I. O1 errs in its characterization of the legal standard applied in the PD.

In § I.A of its Comments, O1 argues that the PD adopts the wrong legal standard. O1 alleges that AT&T Mobility "only sought…a motion to dismiss" and that the standard for such a motion is "whether the complainant has pled sufficiently to plead a cognizable claim" which requires accepting all facts pled by O1 as true. O1 asserts that the PD fails to accept the facts as pled and improperly converts AT&T Mobility's motion to dismiss to a motion for summary judgment which merely considers undisputed facts.[1]

O1 is mistaken. The PD discusses and analyzes the facts under both the "undisputed facts" standard in § 3.1 and § 4 and the "well pleaded complaint" standard in § 3.2 and § 5, and concludes that the complaint must be dismissed under either standard. O1's admission that "this is an issue of first impression before the Commission [which] proves that as a matter of law, AT&T Mobility Wireless is not required to interconnect directly" is central to the PD's finding that the Complaint fails under even the more "generous" well pleaded complaint standard which accepts as true all facts as pled by O1. PD, p. 18. "The assumed truth of the factual allegations

[1] O1's position in its Comments contradicts its previous concession that "the Commission treats motions to dismiss as analogous to motions for summary judgment and applies the same legal standard." O1 Response to AT&T Mobility Motion to Dismiss, p. 7 (Mar. 11, 2016).

cannot alter the fact that California law does not mandate the direct interconnection between networks." *Id.* at 19. In fact, federal law does not require CMRS carriers to interconnect directly with CLECs and permits direct or indirect interconnection under § 251(a) of the 1996 Telecommunications Act. *Id.* at 11-12. Unable to point to any California or federal law, Commission order, or rule that AT&T Mobility has violated, O1 fails to meet its burden under Pub. Util. Code § 1702.

II. O1 errs in criticizing the PD's conclusion that all of O1's causes of action rely on whether AT&T Mobility is obligated to interconnect directly with O1.

The PD is correct to conclude that the crux of this case is whether AT&T Mobility is legally obligated to interconnect directly with O1, and that O1 has conceded the issue by admitting that this is a case of first impression. All of O1's causes of action are false legal constructs that, if accepted by the Commission, would result in forcing AT&T Mobility to interconnect directly with O1. As the PD correctly concludes, because AT&T Mobility is not obligated to interconnect directly with O1, all of O1's causes of action must fail. PD, pp. 18-19. According to the rules of statutory construction, the *general* legal obligations alleged by O1 cannot trump the *specific* federal statutory law permitting AT&T Mobility to interconnect indirectly with O1. AT&T Mobility Reply to Response to Motion to Dismiss, p. 10 (Mar. 25, 2016) (citations omitted).

III. O1 errs in its assertion that the PD fails to account for the "entire record."

O1 argues the PD fails to take into account the "entire record."[2] O1 implies that by citing only the Parties' Opening Testimony, the PD fails to consider the Parties' Reply and Rebuttal Testimony. The PD does not need to cite to the entire record, an impossible task, to have considered it. O1 alone submitted 94 pages of testimony and 753 pages of exhibits.

[2] Comments, §§ I.B, I.C, II.A, II.B, II.C, II.D, II.E.

Furthermore, the PD need only determine "whether there are any triable issues as to any *material* facts," as O1 itself admits. O1 Response to AT&T Mobility Motion to Dismiss, p. 6 (Mar. 11, 2016) (citing *Westcom Long Distance, Inc. v. Pacific Bell*, D.94-04-082, 54 Cal. P.U.C.2d 244 (1994); emphasis added). "To be 'material' for purposes of a summary judgment proceeding, a fact must relate to some claim or defense in issue under the pleadings, and it must also be essential to the judgment in some way." *Riverside County Community Facilities Dist. No. 87-1 v. Bainbridge 17 et al.* (1999), 77 Cal.App.4th 644, 653 (citing *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926). As discussed above, the PD does consider the facts under O1's well pleaded complaint standard, yet still concludes "the assumed truth of the factual allegations cannot alter the fact that California law does not mandate the direct interconnection between networks." PD, p. 19. O1's admission that this is a matter of first impression renders the facts underlying its other causes of action as immaterial, including its alleged lost customers and alleged call completion failures.

IV. O1 errs in its assertion that the PD ignores O1's evidence that three carriers have agreements with the rates, terms, and conditions sought by O1.

O1 argues that the PD ignores evidence allegedly showing that three carriers have direct interconnection agreements with AT&T Mobility containing the rates, terms and conditions that O1 sought. O1 points to three agreements produced by AT&T Mobility in discovery which O1 attached to the Mertz Testimony as Exhibits U, TT, and UU. Again, O1 is mistaken. The PD does consider that AT&T Mobility has direct connection agreements with other carriers:

> What [O1] fails to acknowledge is that if [AT&T Mobility] is interconnecting directly with other telecommunication providers, it is because [AT&T Mobility] has an agreement with the other providers to do so. [AT&T Mobility] would interconnect directly with [O1] if the Parties were able to reach an agreement. [O1] itself admits in its Complaint that [AT&T Mobility] has offered to continue to directly connect with [O1], but the parties much reach an agreement to do so. – PD, p. 15.

The PD cites the Bax Testimony which proffers the undisputed fact that AT&T Mobility offered O1 substantially the same terms and rates as offered to other similarly situated transit carriers like O1. *Id.* at 15-16.

O1 also errs factually in asserting that it is similarly situated to the three carriers identified in the Mertz Testimony. O1 seeks direct interconnection with AT&T Mobility so that it may deliver *third party* traffic to terminate on AT&T Mobility's network. However, the three agreements cited by O1 all contain provisions that limit the exchange of traffic to that which *originates* on either party's network.[3] To the extent O1 relies on this misconstrued factual evidence to support its causes of actions, all of those claims fail.

V. O1 errs in its assertion that the PD denies its right to a hearing.

O1 suggests it has a right to hearing simply for filing a complaint. The mere existence of rules and law articulating the right to dismissal repudiates O1's disingenuous argument which would eviscerate the right to file a Motion to Dismiss in *all* complaint cases. The Commission has the authority to dismiss cases like this, where the standard for dismissal has been met.

VI. O1 errs in its interpretation of case law as requiring AT&T Mobility to interconnect directly with O1 at particular rates, terms, and conditions.

O1 cites *Qwest Order Granting Rehearing* (D.11-07-058) and *Qwest PacBell Case* (D.06-08-006) to stand for the proposition that "when a utility makes an offer available to any carrier, such offer triggers non-discrimination provisions of federal law." Comments, p. 3, n.9. O1 misconstrues the case law yet again, citing a portion of the *Qwest Order* that addresses

[3] Mertz Opening Testimony, Exhibit U, Section 3.2, p. ATTMOBILITY-000632; Mertz Rebuttal Testimony, Exhibit TT, Section 5, p. ATTMOBILITY-001365; and Exhibit UU, Section 1(C), p. ATTMOBILITY-001408.

deviation from tariffs.[4] The *Qwest PacBell Case* also deals with tariffed rates offered by an ILEC. *See* D.06-08-006, *mimeo*, pp. 1-4. The rates at issue here are non-tariffed negotiated rates offered by AT&T Mobility, a CMRS carrier, whose rates cannot be regulated by the Commission under 47 U.S.C. § 332(c)(3)(A). Both decisions are inapposite.

VII. O1 errs in its assertion that a Commission order contradicting federal law and compelling direct interconnection based on terms and conditions demanded by O1 would only have limited precedential value.

In this proceeding, O1 asks the Commission (1) to compel direct interconnection with AT&T Mobility absent a mutual agreement, and (2) at a rate dictated by the Commission, in contravention of § 251 of the 1996 Telecommunications Act and § 332(c)(3)(A) of the *Omnibus Budget Reconciliation Act of 1993*, respectively. The relief that O1 seeks not only creates an obvious conflict with federal law, but also would force the Commission to "make wide-reaching policy determinations that could have an impact on virtually every other telecommunications provider regulated by this Commission." PD, p. 19. O1 errs in its disregard of federal law and the due process rights of affected carriers who are not parties to this proceeding.

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Respectfully submitted,

/s/
MARGARET THOMSON

AT&T Services Legal Department
430 Bush Street, Third Floor
San Francisco, CA 94108
Tel: (415) 268-8977
Fax: (415) 974-1990
E-mail: mt4348@att.com

Counsel for AT&T Mobility

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[4] "[C]ontracting with individual customers *at rates that deviate from those available under the tariffs* raises the issue of whether such contracts violate the nondiscrimination provisions of § 453(a)." D.11-07-058, *mimeo*, pp. 4-5 (quoting D.94-09-065; emphasis added).